

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RUBEN AVENT, 01-A-5796,

Plaintiff,

02-CV-828(Sr)

v.

HERBERT, et al.

Defendants.

ORDER

On May 18, 2010, pursuant to Rule 25(a) of the Federal Rules of Civil Procedure, counsel for defendants filed and served on plaintiff, proceeding *pro se*, a Suggestion of Death with respect to defendant Brian Rydza. Dkt. #74. Rule 25(a) provides in part:

A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion [for substitution] is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Accordingly, within **90 days** from the date of the entry of this Order, the plaintiff must file and serve a motion to substitute the representative of the estate of Brian Rydza as a defendant in this matter. See *Labounty v. Coughlin*, No. 93 Civ. 3443(BSJ), 2003 WL 21692766, at *5 (S.D.N.Y. July 21, 2003) (holding that by reason of plaintiff's *pro se* status, the 90 day period ran from the date of entry of the Court's

Order, and not upon service of the Suggestion of Death, which was served more than 90 days earlier), *citing, McCorkle v. Juchenwicz*, No. 94 CIV 6363(TPG), 1999 WL 163205, at *2 (S.D.N.Y. Mar.23, 1999) (stating, “[i]n all fairness, [a *pro se* plaintiff] cannot be expected to be conversant with the rules about substitution after the death of a party, and in particular cannot be expected to know about Rule 25.”).

The failure of the plaintiff to timely file and serve such a motion to substitute the representative of the estate of Brian Ryzda within 90 days from the date of the entry of this Order, will result in the dismissal of this action as against defendant Brian Ryzda without further order or notice to plaintiff.

SO ORDERED.

**DATED: Buffalo, New York
May 20, 2010**

**s/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge**